IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 970 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SUSHIL HARIRAM DUBEY - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR PP MAJMUDAR FOR MR SP MAJMUDAR for Appellant(s) : 1,
Mr.A.J.Desai, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 19/07/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. The appellant was accused before Special Court under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, (`Atrocities Act' for short), Kutch at Bhuj in Special Case No.67 of 1998. He came to be tried for the offence of murder of Vishnu @ Vishensinh Madanlal allegedly committed by him on 21.1.1997 at about 14.45 hours at Khodiyarnagar Zupadpatti located near FCI colony, Gandhidham in Kutch district. Since the deceased belonged to Scheduled Caste, offence under Atrocities Act also came to be registered. The appellant was charged for offence punishable under Section 302 of Indian Penal Code and Section 3(2)(5) of the Atrocities Act to which he pleaded not guilty and came to be tried. The trial Court concluded that offence under the Atrocities Act was not properly proved by the prosecution and recorded acquittal therefor but convicted the appellant for the offence of murder and sentenced him to undergo imprisonment for life and to pay a fine of Rs.500/-, in default, to undergo simple imprisonment for three months. Aggrieved by the said judgment and order, original accused has preferred this appeal.

2. The facts of the prosecution case in brief are that the deceased was staying with his family in Khodiyarnagar Zupadpatti. One lady Meera was also staying in the said Zupadpatti with her child. Her husband having expired, the appellant was associated with her and used to stay with her place. On the day of incident, the children of the appellant and said

Meeraben had some quarrel on petty issue of fetching water. Pursuant thereto, he said that the deceased went to the house of Meeraben to rebuke her and asked her to control her child. It is alleged that at that time, the appellant was in the house of Meeraben resting on a cot. When the deceased started complaining about the behaviour of Meeraben's child, the appellant flared up and asked the deceased to leave or else something more serious may happen. In that, there was some heated exchange of words and the appellant drew out a knife from his waist-wand and inflicted injuries on the deceased. At that time, one Jimmy Bhurabhai, Kishori Harivansh and Shardaben Bhura were also present. After the incident, it is alleged that the appellant went away. The deceased was taken to Rambag hospital at Gandhidham where he was given some treatment and then was referred to GK General Hospital at Bhuj. The deceased was admitted in the hospital where, while under treatment, he expired on 23.1.1997. The appellant was not traceable as per the prosecution and surrendered before the learned Magistrate, after about 16 months. Thereafter, it is alleged that he discovered knife with which he allegedly caused injuries to the deceased. While the appellant was under treatment at Gandhidham hospital, FIR was recorded by police, so also his dying declaration by Executive Magistrate.

3. We have heard learned advocate Mr.P.P. Majmudar for Mr.S.P. Majmudar for the appellant and learned APP Mr.Desai for respondent State.

4. Learned advocate Mr.Majmudar has assailed the decision of the trial Court mainly on the ground that the trial Court has overlooked the fact that the prosecution evidence does not conclusively prove the cause of death. The evidence is not good enough to attribute the cause of death to the injuries allegedly caused by the appellant. It was contended that if that is so, FIR given by the deceased and the dying declaration given by the deceased before Executive Magistrate both would lose their significance as dying declarations. Mr.Majmudar contended further that the trial Court has overlooked the aspect that the evidence on identity of the assailant is not clear and ambiguous. The possibility of a mistake in identity of the assailant cannot be ruled out. He submitted that in the medical history given to the doctor at Bhuj, name of Sunil Harilal Dubey is given which is not the name of the appellant. He also submitted that at various places, name of Sunil appears as the assailant and these aspects have been brought on record by the defence during the cross-examination of witnesses. It has come in evidence that the Investigating Officer has made no efforts to investigate in the direction of identity of the appellant i.e.,whether it was Sunil Dubey or Sushil Dubey who was the appellant and it has come in evidence that just like appellant, there is one Sunil Dubey and whether name of Sunil Dubey is emerging at various places, it was the duty of Investigating Officer to investigate to that

direction and he having failed so to do, the investigation would be rendered defective.

4.1. Mr.Majmudar submitted further that the procedure followed by the Executive Magistrate while recording the dying declaration is defective. Similarly, the contents of FIR are not properly proved by the Investigating Officer and, therefore, it cannot be treated as a dying declaration.

5. It was contended further that the knife with which the appellant alleged to have committed murder of the deceased which is allegedly discovered by the appellant is found to carry human blood of group of “O”, whereas though there is no specific evidence as to the blood group of the deceased founded on sample being taken of the deceased, the blood found on the shirt of the deceased and the soil collected from the place of the incident is carrying human blood group “AB” and, therefore, it can be inferred that the blood group of the deceased was “AB” whereas the knife carried “O” group. It was contended by Mr.Majmudar further that it has come in evidence of Dr.Baxi that the deceased was transfused blood and that blood was of “A positive” group. It has also come in evidence of Dr.Baxi that if blood of an opposite group is given, it may result into transfusion reaction and reactional shock which may result into death. If that is so, there is no positive evidence that the death had not occurred because of blood transfusion and the cause of death

indicated in the postmortem note would become doubtful. Mr.Majmudar, therefore, submitted that the trial Court has over looked all these aspects while recording conviction. Mr.Majmudar, therefore, submitted that the appeal may be allowed giving benefit of doubt to the appellant and conviction may be set aside.

6. The appeal is opposed by learned APP Mr.Desai. He submitted that there is positive evidence of Doctors as well as in form of opinion in the postmortem note about the cause of death. He submitted that only a hoax is created during cross examination about transfusion of blood and likelihood of death in event of transfusion of blood of opposite group.

6.1 As regards the identity of the assailant, Mr.Desai submitted that the deceased has been consistent in the FIR, in the DD as well as in the history before the Doctor that he was assailed by Sushil Hariram Dubey. He fixes the identity of Sushil Hariram Dubey as son of Hariram Dubey who is engaged in disc antenna business and as such there is no confusion on identity of the assailant and the deceased had earlier worked with Hariram and, therefore, knew Sushil Dubey very well. Mr.Desai submitted further that so far as name of Sunil Dubey being recorded in the history by the Doctor, the case paper is forming part of the record and the Doctor who recorded the said history has also not been

examined as witness. It is only from the case papers that Dr.Baxi has stated that in the history assault by Sunil Hariram Dubey is recorded. It was further contended that the conduct of the appellant after the incident is important. The appellant was absconding for nearly 16 months and then surrendered to the Judicial Magistrate, First Class. He, therefore, submitted that the trial Court was, therefore, justified in convicting the appellant.

6.2 Mr.Desai submitted that dying declaration recorded by the Executive Magistrate is proved through his deposition and he has in his deposition indicated that the deceased was in fit state of mind and was in condition to give the declaration. He submitted that the Executive Magistrate is an independent Government personnel and has no interest in any of the parties. He has no reason to tell a false story and, therefore, dying declaration may be accepted as has been done by the trial Court.

7. We have considered rival side contentions and have examined R & P in light of those contentions.

8. Dr.Rajesh Shyam Sunder Khatri (Exh.62) is the Doctor to whom the deceased was taken first. He was Medical Officer at Rambagh Hospital at Gandhidham. The deceased was taken to him by Manjulaben wife of deceased. The Doctor says that he gave him primary treatment and informed Gandhidham

Police. He noticed four injuries on person of the deceased. (1) Oblique incised stab wound of size of 3 x 1 1/2 cm on stomach just below sturmn, intestines were prone out. (2) Oblique stab incised wound of size of 1/2 x 0.05 cm at the base of the neck. (3) A stab incised wound of the size of 2.5 cm x 1 cm on the left chest 6 cm below the left nipple (4) A stab incised wound of the size of 2 cm x 0.50 cm in the right arm pit area. According to the Doctor, injury No.2 (found on neck) may have caused the death of the deceased. According to him, muddamal article No.4 knife may have caused the injuries found on person of the deceased. He said that he informed the police, Executive Magistrate came for recording the dying declaration and he took the Executive Magistrate to the patient, the patient was in the dressing room and was conscious. He told the Executive Magistrate that he may record the dying declaration. He gave certificate about the conscious state of the deceased by Exh.57. The Doctor has been cross examined. The Doctor states during the cross examination that he did give certificate to the Executive Magistrate about the conscious state of the patient. He also says that he had given certificate in this regard and after giving certificate, he returned to his room. Thereafter, he was informed by the Executive Magistrate that recording of dying declaration was over. He admits that his signature was not taken on the dying declaration after it was recorded.

8.1 Doctor states during cross examination that he had not measured depth of either injury No.1 or injury No.2. Voice larynx is located at the seat of injury No.2. He says further that the injury was of a serious nature. He states that lungs, brain, larynx, tongue, lips, teeth, trachea etc., are the organs which are used while a man speaks and a man can speaks properly only if they all act in co-ordination. The Doctor says that he had not examined the internal injuries and had taken sutures. He said that patient was shifted to G.K.General Hospital, Bhuj after dying declaration was recorded. He denies suggestion that the declarant was unconscious and unable to speak.

8.2 Dr.Vinodbhai Ganeshbhai Baxi is examined at Exh.59. He is the Doctor who performed the postmortem. He describes the injuries noticed by him on the dead body which are the same as injuries described by Dr.Khatri. In addition, he describes one injury which was a surgical injury for cause for blood transfusion. He says that he found about 50 cc of blood from the plural cavity of left lung and about 500 ml of dark blackish red blood from the paritorian cavity. About 500 ml., of blood was found from the stomach also. The stomach was sutured at five places. According to him, the death occurred because of shock due to hemorrhage. The doctor says that the injuries were sufficient in ordinary course of nature to cause death. He says that the patient was brought at about 7.50 p.m., on 21.1.1997 and was

admitted by Dr.Hansaben. The notes made by Dr.Hansaben indicates that the patient was drowsy. In the medical case papers, it is indicated that the patient was assaulted upon with a knife by Sunil Dubey. It emerges from the cross-examination further that the deceased expired on 23.1.1997 and during the period of treatment, he was operated upon as well as blood was also transfused. The doctor states from the case papers that blood of group `A positive' was transfused but in the next breath, he speaks of group A only. He admits that if a person with a specific blood group is transfused with blood of another group, the body would reject the blood. He also admits that if the blood of opposite group is transfused, he may be uncomfortable and may expire. Such a situation is called transfusion reaction. In such cases, the patient goes into shock. The doctor admits that he was not informed about the group of blood found on clothes of the deceased or the group of blood found on the knife. He says that lungs were injured. He admits that in such a situation, the blood accumulated in the lungs would enter trachea when the patient respirates and in such a situation, the patient may not be able to speak properly.

8.3. What emerges from the evidence of these two doctors is that when the patient was taken to GK General Hospital, Bhuj, he was in drowsy state of mind. It also comes in evidence that in the case papers, the history of assault by Sunil Dubey was given. It also comes in evidence of Dr.Baxi that

blood was transfused while he was treated at Bhuj and the doctor has not stated as to what was the blood group of the deceased. He has stated that he was not informed about the blood group found on the clothes of the deceased. From deposition of Dr.Baxi, the evidence on blood transfusion is that the deceased was given blood either of A group or of A Positive group. The doctor says that if the blood of opposite group is transfused, the patient may die of transfusion reaction or reactional shock. We do not have a specific evidence as to the group of the blood of the deceased as no sample was taken but it can be inferred that because his shirt carried AB group so also the soil recovered from the place of incident was stained with blood of AB group, the blood group of the deceased was AB. Against that he was transfused blood of group A. Whether A or A positive is a question which has remained unanswered. From the FSL report also, we find that the blood group found on the shirt of the deceased and from the soil is AB. Whether it is AB positive or AB negative is not clarified and in absence of any evidence, we are unable to form an opinion as to whether blood group A or A positive that was transfused in the body of the deceased would have matched the deceased or would have been opposite to the deceased. No specific question is put to the doctor by the defence in this regard. Only the theory is brought on the record but the prosecution has also not clarified the situation and hence the situation.

8.4. It is of course true that the P.M.Notes indicate the cause of death to be hemorrhagic shock. The doctor has also said the same thing but the evidence on transfusion part raises a question. Whether conclusively, it can be said that blood transfusion could not have caused death or whether it can infallibly be concluded that the death was only because of hemorrhagic shock when the deceased survived for two days.

9. Apart from the medical aspect, if we examine the evidence on incident, we find that witnesses Jimmy Bhurabhai, Kishori Harivansh and Shardaben Bhura are examined at Exhs.28, 35 and 51 respectively. They were cited as eye witnesses to the incident but none of them have supported the prosecution case and have been declared hostile. It would be proper to state the Jimmy Bhurabhai Exh.28 initially supported the prosecution case but she gave certain admissions during cross-examination which prompted the prosecution to treat her as hostile to the prosecution and was subjected to cross-examination by the learned APP. During cross-examination of learned APP, she has denied that she saw the incident and that she is not supporting the prosecution at the instance of Madanlal Ajmeri. She says that the knife was lying in the house of Meeraben at the time of incident (which in fact is allegedly discovered by the accused).

9.1. The ultimate out-turn is that none of the

eye witnesses have supported the prosecution.

10. Witness Madanlal Ajmeri, father of the deceased (Exh.33) states that he was informed by Jitubhai Rickshawwala that his son is assaulted by Sunil Dubey and that he has dropped the injured at Rambag hospital. He, therefore, went to Rambag hospital in rickshaw of Jitubhai and was informed by the doctor that his son is required to be sent to Bhuj hospital and, therefore, arrangement for taxi may be made. He says that he went to his son Vishnu while he was at the hospital and Vishnu told him that he was betrayed. He says that the children had gone to fetch water and had a quarrel there. His daughter came back crying and, therefore, Vishnubhai and his wife Manju went to house of Meeraben. The witness further says that the deceased told him further that Sunil was there. There was discussion and Sunil asked him to leave and then Sunil inflicted knife blows. This witness has identified the accused in the Court as Sunil. It transpires from the cross-examination that the words were put into the mouth of the deceased by this witness that he was betrayed and assault was committed, he suggested to have been not stated in the police statement which the witness denies.

10.1. Witness Jitendra Kripashankar Exh.34 says that he knew Vishnu as well as the accused. On the day of incident, when he was standing with his rickshaw near FCI colony, Shardaben approached him

and told him that Vishnu is injured with a knife and that he should take him to the hospital. Therefore, he took Vishnu to Rambag hospital. Later on, he was informed by Shardaben that the quarrel erupted in respect of fetching of water and Sushil Dubey has inflicted knife. This witness has no personal knowledge about the incident.

10.2. Witness Sardarsinh Valabhai Exh.66 was the PSO on the day of incident at Gandhidham Police Station but made entry in the occurrence report registered on basis of information received by him from Dr.Khatri of Rambag hospital. Copy of the entry is produced at Exh.67. In that entry, it was reported that injured Vishensinh of railway colony has been inflicted knife blow on chest by Sushil Dubey in a fight and has been brought to hospital by Manjulaben Vishensinh.

10.3. The Investigating Officer Vinodbhai Tolia Exh.70 says that on receiving information while being on prohibition patrolling, he went to Rambag hospital and recorded the information given by Sushil Dubey and then he rectifies his error. He says that it was given by Vishnu @ Vishensinh which he recorded and obtained the signature of the injured. Said FIR is at Exh.71. He says that he could not locate the assailant. He recorded statements of Kishori Harivansh, Shardaben etc. During cross-examination, he admits that he did not get the blood group of the deceased checked or identified. He says that he did

not know the name of the accused prior to the incident nor did he know the accused. He was not aware about any order of the High Court requiring the accused not to enter the limits of Gandhidham. He was shown order dated 2.4.1993 about which he was not aware. He says that accused was absconding and wanted in a murder case of 1990. Witness pleads ignorance about Sunil Dubey. He says that he was not aware if any Sushil Dubey stays in Gandhidham. He is not aware about the fact that name of younger brother of Sushil Dubey is Sunil Dubey. The witness is shown one person as Sunil Dubey whom he says he did not know. He also admits during cross-examination further that when he recorded the statement of Madanlal Ajmeri, he stated that Guddu @ Sunil had inflicted knife blows on his son. He says that he had recorded the statement of father of the deceased on two occasions. First when the deceased was alive and second after he passed away. He says that he did not seek any clarification about Sunil.

10.4. Executive Magistrate Mukesh Labhshankar is examined at Exh.56. He says that on receiving yadi from police, he went to Rambag hospital for recording dying declaration. He met Dr.Khatri who took him to the patient whose dying declaration was to be recorded. The patient was in the dressing room. The doctor examined the patient and said that he was in fit state to give declaration. The witness says that he recorded the statement of the declarant which has given by him and then obtained his signature,

thereafter, he put his own signature. He placed on record the original dying declaration which is at Exh.57. The Executive Magistrate has been cross-examined at length on the method of recording dying declaration and procedure followed by him but we find that nothing emerges out of it to show any defect in the method of recording of the dying declaration. In fact, what is stated by the Executive Magistrate is supported by the doctor regarding state of health and ability to give declaration, absence of any other person while recording the dying declaration and the Executive Magistrate being taken to the patient by the doctor and the doctor certifying about the state of health of the patient before recording of the dying declaration. The Executive Magistrate has also stated that he had introduced himself to the patient and informed him that he had gone to record the dying declaration which the patient gave. He says that he had asked the patient about his name, age, address etc., to which he replied. All these factors would go to show that the deceased was in a state of mind to give declaration. A look at the dying declaration indicates that the deceased implicated Sushil Dubey as the assailant. In the dying declaration, the declarant has given more details about Sushil Dubey as son of Hariram Dubey engaged in disc antenna business with whom he was working.

11. The evidence taken as a whole. This would indicate that the deceased in his FIR as well as the dying declaration, Executive Magistrate has

implicated Sushil Dubey and has fixed the identity of Sushil Dubey as son of Hariram who was engaged in disc antenna business. The recording of dying declaration is beyond shadow of doubt. The question is whether there is evidence to show that Sushil Hariram Dubey who assailed the deceased is Sushil Dubey before the Court. In this regard, it may be noted that there is no evidence worth a name to fix identity of Sushil Dubey as Sushil Dubey son of Hariram Dubey who was engaged in disc antenna business. There is no other means to fix the identity of the accused as assailant Sushil Dubey with help of any other means like address etc. Ordinarily, such a view is difficult to be taken but in the instant case, there are various other factors which have weighed with us in taking a stringent approach while examining the identity of the assailant and the accused.

12. We may refer to such factors. Firstly, there is a confusion emerging from evidence as to whether it was Sushil Dubey or Sushil Hariram Dubey who committed the assault or it was Sunil Hariram Dubey who committed the assault. The father of the deceased Madanlal has consistently referred to the assailant as Sunil. Even in Court, he identifies the accused as Sunil. It is also indicated during cross-examination of the Investigating Officer that Hariram has two sons Sushil and Sunil. It has also come in evidence of Investigating Officer that Madanlal has referred to the assailant as Guddu @ Sunil and in spite of all

these discrepancies or inconsistencies, the Investigating Officer has not tried to ascertain or to investigate in the direction as to whether the assailant was Sushil or Sunil or whether it was Guddu @ Sunil or whether Sushil is also known as Sunil because the father of the deceased has always referred to the assailant as Sunil.

12.1. Apart from this, there is one more factor, namely, find of blood on the knife allegedly used by the appellant – accused and allegedly discovered by him. The knife carried blood group `O' on it as per FSL report Exh.23 whereas the shirt of the deceased and the soil carried blood group `AB' as per Exh.17. Now, if the assailant has committed assault with the muddammal knife is the case of the prosecution, then the knife ought to carry blood group `AB'. How does the knife carry group `O' is a question which has remained unanswered. Therefore, the story about the discovery made also become doubtful, more so, when Jimmy in cross-examination to the learned APP has stated that the knife was lying at the place of incident.

12.2. There is one more factor that again arises doubt. The Investigating Officer has admitted that he never knew the accused before the incident. It has come in evidence that the accused was involved in a murder case in 1990 and was bailed out in 1993 temporarily where from he absconded. It has also come in evidence that while he was bailed out in the year

1993, he was supposed not to enter Gandhidham area and there is no record to show that the appellant had committed any breach of that order or any breach was alleged.

13. The prosecution evidence taken as a whole thus cannot be said to be good enough to prove the guilt of the appellant beyond reasonable doubt. The view is supported by following factors :

1) The evidence as to cause of death is not conclusive.
2) Though recording of dying declaration is properly recorded, it implicates Sushil Dubey. The identity of the accused as the appellant; Sushil Dubey s/o Hariram Dubey engaged in disc antenna business is not properly established. The confusion prevails as to the name of the assailant being Sushil Dubey, Sushil Hariram Dubey, Sunil Dubey and Guddu @ Sunil.
3) The find of different blood groups on the knife allegedly used in commission of crime and discovered by the appellant is not explained.
4) The eye witnesses who are independent persons have not supported the prosecution case.
5) The Investigating Officer has not made any attempt to investigate and clear the doubt about the identity of the appellant.

14. In our view, if all these factors are considered collectively, it is risky to uphold the

conviction of the appellant. We, therefore, accept the appeal.

15. For the reasons stated hereinabove, the appeal is allowed. The judgment and order dated 21.7.1999 passed in Special Case No.67 of 1998 by the learned Additional Sessions Judge, Special Judge (Atrocity), Bhuj-Kutch is hereby set aside. The appellant is acquitted of charges levelled against him. The appellant be set at liberty forthwith, if not required in any other case.

(A.L.DAVE, J)

(SHARAD D DAVE, J)

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